No. 50108-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

CORY TASH,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases:

United States Supreme Court

Washington State Cases

Statutes

Bill Information

Court Rules

I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court misapplied RCW 9A.44.130 when it construed it as requiring Mr. Tash to re-register when he was released from custody after serving time for an offense that was not a sex or kidnapping offense.

2. The trial court misconstrued RCW 9A.44.130(4) by finding that the State was not required to give Mr. Tash notice of his obligation to re-register when he was released from custody of the Nisqually Jail on June 1, 2016.

3. The trial court erred by imposing mandatory legal financial obligations without making any inquiry as to Mr. Tash's present or future ability to pay.

Issues Pertaining to Assignments of Error

1. Does RCW 9A.44.130, as amended in 2015, require a sex or kidnapping offender to re-register with the sheriff in the county where the offender resides after being released from custody after being incarcerated for any offense - or just sex offenses.

2. Where RCW 9A.44.130 is ambiguous as to whether the duty to re-register arises after release from any offense or only sex

offenses, must the statute be interpreted in the defendant's favor such that the duty to re-register arises only where the defendant was in custody for a sex offense.

3. Was the notice defendant received regarding his duty to re-register after being released from custody adequate under RCW 9A.44.130(4)(a)(i).

4. Did the trial court's assessment of mandatory legal financial obligations without inquiring as to the defendant's ability to pay violate substantive due process.

II. STATEMENT OF THE CASE

On November 3, 2003 Cory Tash was convicted of Indecent Liberties in Thurston County Superior Court. He was fifteen years old at the time of the offense. CP 51; See Information at CP 5. The parties stipulated that Mr. Tash was thereafter required to register as a sex offender. CP 60. The parties also stipulated that on February 8, 2016 Mr. Tash was convicted of the crime of felony Violation of Sex Offender Registration, thus making the current failing to register charge a Class C felony. CP 59.

Mr. Tash was in custody of the Nisqually Jail for a DOC violation until his release on June 1, 2016. The parties stipulated that as of June 3,

2016, "He has not submitted a change of address to where he is now living." And, that up to July 6, 2016 he had not checked in with the Thurston County Sheriff and that his whereabouts were unknown to that office. CP 53.

The Information in the instant case was filed on October 5, 2016. Mr. Tash was charged with Violation of Sex Offender Registration under RCW 9A.44. (1)(a) CP 5. A jury trial was ultimately set for February 14, 2017. CP 13. On that date, and while the jury panel was arriving, the Court addressed pretrial issues with counsel for the State, Mr. Tash's attorney and Mr. Tash. RP 1-12.

Mr. Tash's attorney had filed a motion to bifurcate the trial so that the jury would first determine issues of whether Mr. Tash had a duty to register and did not do so, then determine if he had a predicate conviction for failing to register, to establish a Class C felony as opposed to a gross misdemeanor. CP 38-41. The State agreed and the Court summarily granted the motion. RP 9-10.

Mr. Tash's attorney also filed two stipulations, the first stating that Mr. Tash was required to register as a sex offender under applicable statutes, and the second; that he had a prior conviction for failing to register. CP 59-60.

The Court then addressed the motions in limine filed by Mr. Tash and the State, all of which were granted. RP 13-15.

The Court then addressed Mr. Tash's motion to remove restraints while he was in the courtroom. His attorney offered to stipulate that the restraints were not "overly oppressive" and withdraw the motion, but the Court directed that they resolve the issue on the record due to constitutional concerns. RP 15-16. A corrections deputy with the Thurston County Sheriff's Office testified that the leg restraints were not visible under Mr. Tash's pant legs and that they would not impede his limited movements in the courtroom. He also testified that current staffing levels made it difficult to have two deputies in the courtroom, which would be necessary if there were no restraints. RP 16-20. After hearing argument from the State, the Court ruled that the restraints were appropriate. RP 22-23.

Then, as the Court was preparing to call in the jury, Mr. Tash's attorney informed the Court that, having had the opportunity to review the State's proposed instructions the night before, he had determined that the case boiled down to a single dispositive legal issue. That is, the State's position is that whenever someone is taken into custody they must re-register within three days after they are released. Mr. Tash's position was that RCW 9A.44.130 only requires re-registration if you were in custody

as a result of a sex or kidnapping offense. And, there was no dispute that Mr. Tash was *not* in custody for a sex or kidnapping offense when he was released on June 1, 2016. RP 25-26. He then stated:

> I guess what I'm saying, your Honor, is it may well short circuit this trial because if you agree with the State, I really don't have an argument to make to the jury based on our reading of the statute. If you agree with us, then I think maybe the State would take another look at proceeding with this case.
> ...
>
> If you agree with the State, it probably takes away my argument in closing. We probably would consider at that point waiving jury and doing a stipulated facts trial. RP 26.

The Court and counsel then engaged in a colloquy - agreeing that the defense was making the equivalent of an oral *Knapstead* motion. Mr. Tash then conferred with his attorney and they executed a written waiver of jury trial. The Court, after going over Mr. Tash's constitutional rights to a jury trial with him, approved the waiver of jury trial. The Court then excused the jury and recessed to enable the State and defense to research the issue and return for argument. RP 27-37.

The State drafted a brief and submitted it to the Court. CP 63- 65. The Court returned, after researching the issue, and framed the issue as whether the 2015 amendment to RCW 9A.44.130, which is the statute governing the registration requirements for a person convicted of a sex

offense, required re-registration any time they were released after being incarcerated, or only if they were in custody for the sex offense conviction for which they were required to register. The Court noted that the consequences of the amendment was an issue of first impression in the appellate courts and that the published legislative history was silent as to the legislative intent behind the amendment. RP 37-39. RCW 9A.44.130 with the 2015 amendments states in relevant part:

> (1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, ... who has been found to have committed or has been convicted of any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence... . When a person required to register under this section is in custody of ... a local jail ... as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.
> ...
>
> **(4)**(a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. ~~(A)~~ Sex offenders ~~who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B)~~ **or** kidnapping offenders who ~~on or after July 27, 1997,~~ are in custody of ... a local jail ..., must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the

> county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence. ... The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

During argument, Mr. Tash's attorney emphasized that all of the sections and subsections of RCW 9A.44.130 must be read together. Accordingly, the first part of Section (4)(a); "**(4)**(a) Offenders shall register with the county sheriff within the following deadlines:" must be read together with Section (1)(a); (1)(a) "... When a person required to register under this section is in custody of ... local jail ... as a result of a sex offense or kidnapping offense the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person." Therefore, sex offenders are required to re-register after being incarcerated *only if* they were in custody for a sex or kidnapping offense.

In other words, the legislature removed the language in the first sentence of RCW 9A.44.130(4)(a)(i) as a housekeeping measure because that language was superfluous with the last sentence of Section (1)(a). RP 41-42.

Counsel also argued that reading the 2015 amendment to create an independent duty to re-register upon release from custody for any criminal offense could lead to an absurd result:

> To carry the State's argument to its logical limit would mean if one is, for example, arrested for DUI and is taken to a county jail, bails out after one hour, you then must go and reregister because you were in custody for an hour, and I don't think the legislature ever meant to imply that kind of requirement. You get to a slippery slope as to how long you have to be in custody before you have to reregister. I just don't think that's what it means. RP 42.

After hearing argument, the Court decided that the reason for the 2015 amendment was that the Legislature wanted to tighten sex offender registration requirements and there would be no reason to strike the first sentence of RCW 9A.44.130(4)(a)(i) unless it was to broaden an offender's duty to re-register when they were released from custody for *any* criminal offense. RP 49-50

The next issue was whether the State had given Mr. Tash adequate notice of his obligation to re-register as required by the last sentence of the first paragraph of RCW 9A.44.130(4)(a)(i):

> (i) OFFENDERS IN CUSTODY. Sex offenders ... who are in custody of the state department of corrections ... or a local jail ... must also register within three business days from the time of release with the county sheriff ... . The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. *Emphasis added.*

The record shows that Mr. Tash did not receive any notice of his obligation to re-register from the Nisqually jail when he was released from custody on June 1, 2016. He did receive and sign a Sex Offender/Kidnapping Registration Requirements form on December 26, 2014, *a year and a half earlier*, when he was released from the Thurston County Jail. CP 57-58. That form provided notice that:

> 1. If you are an offender who is currently in custody for a sex offense, you must register with your incarcerating agency at the time of release. You must also register in the county where you reside within three business days of your release.
>
> 2. If you change your address within Thurston County, **or have been released from custody**, you are required to notify the Thurston County Sheriff's Office in person or by mail within three business days of moving to the new address. If you make your notification by mail it must be sent by certified mail return receipt requested. When submitting written changes to include the following information: **A) The date. B) Your old address. C) your new physical and mailing address, phone number. D) Your signature**. (Emphasis in Original).

A second, and the only other attempt to provide notice to Mr. Tash, is noted in an entry in a phone log by the Thurston County Sheriff's Office:

> Date Added: 6-3-2016 11:43AM (ET)
>
> Investigative Note: OFFENDER RELEASED FROM NISQUALLY JAIL ON 06/01/2016. HE HAS NOT SUBMITTED A CHANGE OF ADDRESS AS TO

> WHERE HE IS NOW LIVING. I LEFT A PHONE MESSAGE AT HIS LAST REGISTERED ADDRESS INSTRUCTING CORY TO SUBMIT A CHANGE OF ADDRESS. I ALSO INFORMED DET FRAWLEY. (CP 53).

The Court, determining that the lack of notice went to the issue whether Mr. Tash knowingly failed to re-register (CP 60), and that *State v. Clark*, 75 Wash.App. 827, 880 P.2d 562 (Div. 1, 1994) dictated that the registration notices provided to Mr. Tash were not sufficiently deficient to require dismissal. RP 66-67.

The Court then proceeded with the stipulated facts trial, indicating that the Court had reviewed the two stipulations and the packet submitted by the State, and requested argument by counsel. After that the Court first determined that Mr. Tash did have a duty to register and that he did not re-register after being released from custody on June 1, 2016. RP 75-76. The Court then addressed whether Mr. Tash knowingly failed to comply with his duty to re-register:

> That leaves the final element that there has been much discussion regarding, which is whether or not you, Mr. Tash, knowingly failed to comply with the registration requirements within three business days from your release from custody on June 1st, 2016. That issue comes down to whether or not you received notice, in the Court's opinion, of that requirement. The Court is sensitive to the fact that perhaps it could have been best practice if you were in person given that warning as you were leaving custody that you would be required to give that new address within three business days. The Court does note in the record,

> however, that there was an effort made to give you that second very notice by means of a phone call to your last known address two calendar days after you were released. Additionally, the Court notes that in December of 2014 you were given notice of your requirements, and I will quote for the record: "If you change your address within Thurston County or have been released from custody, you are required to notify the Thurston County Sheriff's Office in person or by mail within three business days of moving to the new address." You signed that in December of 2014. While there would come a point in time where that would be too distant in time, in the Court's opinion, for that to satisfy the requirements of giving you notice for this to be a knowing violation, this is not that case. The Court finds that that notice is sufficiently close in time to when you left. When combined with the other efforts from Thurston County to contact you at your prior address, I find that the final element of the crime requiring that you knowingly failed to comply with registration within three days of release from custody has been satisfied beyond a reasonable doubt. For those reasons, the Court is finding you guilty of the crime that you have been charged with in the information in this case. RP 76-78.

Finally, The Court asked Mr. Tash if he had any questions. Mr. Tash answered, "... I don't know. Because I've been at the same address. I've been doing this since I was 14 years old. I'm 29 now. It's really hard -- you know, I've been at the same address. Every time I've been picked up by the police for this, even the last time, I was at my address. ... ."

Mr. Tash was then sentenced to 22 months of confinement on March 14, 2017. CP 84-96.

III. SUMMARY OF ARGUMENT

RCW 9A.44.130 is the statute governing the initial registration and re-registration obligations of sex offenders. The statute has been amended a number of times over the years. The most recent amendment was in 2015 and at issue is the meaning of the language in §(1)(a) requiring a person to re-register as a result of a sex offense or kidnapping offense and the meaning of the language that was deleted from §(4)(a):

> **(4)**(a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. ~~(A)~~ Sex offenders ~~who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B)~~ **or** kidnapping offenders who ~~on or after July 27, 1997,~~ are in custody of ... a local jail ..., must ... register within three business days from the time of release with the county sheriff for the county of the person's residence. ... The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

If §(1)(a) and §(4)(a) are read together then an offender's duty to re-register arises only if they are incarcerated as a result of a sex offense. However, at best, the statute in ambiguous and therefore must be construed in the defendant's favor. The defendant was not in custody as a result of a sex offense and therefore he had no obligation to re-register after his release on June 1, 2016.

The statute also requires that the agency having jurisdiction of the incarceration of the defendant (i.e. in this case, the Nisqually Jail) shall give notice to the defendant that he is required to re-register. The defendant did not receive adequate notice under the statute.

Finally, The trial court failed to make any inquiry as to defendant's ability to pay legal financial obligations before imposing the mandatory LFOs, thereby violating defendant's substantive due process rights

IV. ARGUMENT

1. The trial court misapplied RCW 9A.44.130 when it construed it as requiring Mr. Tash to re-register when he was released from custody after serving time for an offense that was not a sex or kidnapping offense.

a. Standard of Review.

An appellate court reviews a trial court's interpretation of a statute de novo. *State v. Weatherwax*, 188 Wash.2d 139, 148, 392 P.3d 1054 (2017). The court's primary duty in construing a statute is to determine the legislature's intent. *Id*; *State v. Ervin*, 169 Wash.2d 815, 820, 239 P.3d 354 (2010). Statutory interpretation begins with the statute's plain meaning, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent

which is discerned from the ordinary meaning of the language used, related statutory provisions, and the statutory scheme as a whole." *Id.* If the statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and circumstances surrounding its enactment to determine legislative intent. *Weatherwax,* 188 Wash.2d at 149.

A statute is ambiguous '[i]f more than one interpretation of the plain language is reasonable.' *Weatherwax*, 11 Wash.2d at 154, citing *State v. Evans*, 177 Wash.2d 186, 192, 298 P.3d 724 (2013).

If a statute is ambiguous it must be strictly construed in favor of the defendant. *Weatherwax*, 188 Wash.2d at 156, citing; *State v. Conover*, 183 Wash.2d 706, 712, 335 P.3d 1093 (2015). " '[W]hen choice has to be made between two readings of what conduct [the legislature] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.' " Id, citing: *State v. Tvedt*, 153 Wash.2d 705, 710-11, 107 P.3d 728 (2005) (quoting; *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 222, 73 S.Ct. 227 (1952)). "The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties. *Weatherwax*, 188 Wash.2d at 15, (cites omitted).

"When interpreting statutes, 'we presume legislature did not intend absurd results,' and thus avoid them where possible." *Weatherwax,* 188 Wash.2d at 148; citing, *State v. Eato*n, 168 Wash.2d 476, 480, 229 P.3d 704 (2010) (citing *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003).

b. Analysis.

Cory Tash was convicted for Indecent Liberties as a juvenile in 2003. His obligation to register and re-register thereafter is defined by RCW 9A.44.130 (2015), which provides in relevant part:

> (1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, ... who has been found to have committed or has been convicted of any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence... . When a person required to register under this section is in custody of ... a local jail ... **as a result of a sex offense or kidnapping offense**, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.
> ...
>
> (4)(a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. Sex offenders or kidnapping offenders who are in custody of ... a local jail ..., must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. ... The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence. ... The agency that has jurisdiction over the

> offender shall provide notice to the offender of the duty to register. (Emphasis added).

The meaning of this statute appears to be clear on its face. That is, under the first sentence of §(1)(a), a person convicted of a sex or kidnapping offense must initially register with the sheriff in the county where they reside. And, if that person is subsequently in custody in a local jail "as a result of a sex or kidnapping offense," they must re-register when they are released.

§(4)(a) then expressly sets forth the deadline for the offender to re-register - when they are released from custody "as a result of a sex or kidnapping offense" as stated in §(1)(a).

In this case, Mr. Tash was not being held for a sex or kidnapping offense when he was in the custody of the Nisqually Jail. Therefore, under the plain language of the statute he had no duty to re-register when he was released from custody. To impose a duty to re-register any time an offender is in custody for *any* criminal offense you must ignore the language in §(1)(a) that imposes this obligation if the offender is in custody "as a result of a sex offense or kidnapping offense." And, you must also also ignore the first part of §(4)(a) stating that the section is limited to the deadlines to re-register (for those who are obligated to do so).

Interpreting §(4) as imposing a duty for an offender to re-register independently from §(2) creates an ambiguity in the statute. Looking to the legislative history of the bill to determine the legislative intent to help resolve the ambiguity is not helpful here because the published legislative history is silent why language was deleted from §(4):

> **(4)**(a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. ~~(A)~~ Sex offenders ~~who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B)~~ **or** kidnapping offenders who ~~on or after July 27, 1997,~~ are in custody of ... a local jail ..., must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence. ... The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

The only hint as to legislative intent is in the final bill report explaining the 2015 amendment "close[d] various loopholes" and "provide[d] clarification with regard to sex offender registration." Final B. Rep. on S.S.B. 5154, at 3, 64th Leg., Reg. Sess. (Wash. 2015). However, in attempting to clarify RCW 9A.44.130 the legislature left the statute

susceptible to two reasonable interpretations when it comes to the duty for an offender to re-register after being in custody for an offense that is not a sex or kidnapping offense. The statute is therefore ambiguous and it must be interpreted in favor of Mr. Tash.

Finally, Mr. Tash's trial counsel ably pointed out the absurd results that could happen if RCW 9A.44.130 is interpreted as requiring an offender to re-register following their release from custody for *any* criminal offense:

> To carry the State's argument to its logical limit would mean if one is, for example, arrested for DUI and is taken to a county jail, bails out after one hour, you then must go and reregister because you were in custody for an hour, and I don't think the legislature ever meant to imply that kind of requirement. You get to a slippery slope as to how long you have to be in custody before you have to reregister. I just don't think that's what it means. RP 42.[1]

The purpose behind sex offender registration is to assist law enforcement agencies' efforts to protect the public by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend. *State v. Watson*, 160 Wash.2d 1, 9-10, 154 P.3d 909 (2007). The DUI hypothetical - or consider the situation where an offender is a DV

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[1] Division 2 has held that being arrested for a driving offense does not trigger the duty to re-register under a prior version of RCW 9A.44.130(4)(a)(i). *State v. Caton*, 163 Wash.App. 659, 679 (Div. I, 2011); reversed on other grounds, 174 Wash.2d 239, 273 P.3d 980 (2012).

victim who is in custody on a material witness warrant - or consider the plethora of fact patterns where someone is taken into custody then released (for example due to jail overcrowding) - illustrate situations where re-registration every time someone is in custody, has no relationship with the stated public safety goals; or common sense.

2. The trial court also misconstrued RCW 9A.44.130(4) by finding that the State was not required to give Mr. Tash notice of his obligation to re-register when he was released from custody of the Nisqually Jail on June 1, 2016.

The trial court ruled that, although it would have been best practices for the Nisqually Jail to inform Mr. Tash he was supposed to re-register after his release on June 1, 2016, The Thurston County Sheriff's Office Sex Offender/Kidnapping Registration Requirements Form he received and signed a year and a half earlier plus the voicemail left on his phone was all the notice required by the statute. And therefore, Mr. Tash knowingly failed to register. CP 76-78.

RCW 9A.44.130(4)(a)(i) states in pertinent part:

> (4)(a) Offenders shall register with the county sheriff within the following deadlines:
>
> (i) OFFENDERS IN CUSTODY. Sex offenders or kidnapping offenders who are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a

> local jail or juvenile detention facility, must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. (Emphasis added).
>
> ...

Here, the Nisqually Jail is the "agency that has jurisdiction over" Mr. Tash. And, the statute clearly provides that the agency "shall provide notice" to Mr. Tash of his duty to register after his release from custody. This issue was addressed in *State v. Munds*, 83 Wash. App. 489, 495, 922 P.2d 215 (Div. III, 1996) where this court held that lack of statutory notice of the duty to register is corrected by giving actual notice, which then would trigger the duty to register. Citing; *State v. Cla*rk, 75 Wash.App. 827, 832-33, 880 P.2d 562 (Div. I, 1994).

The trial court erred when it determined that the Thurston County Sheriff's Office Sex Offender/Kidnapping Registration Requirements Form that Mr. Tash received and signed on December 26, 2014. That form provided notice that:

> 1. If you are an offender who is currently in custody for a sex offense, you must register with your incarcerating agency at the time of release. You must also register in the county where you reside within three business days of your release.
>
> 2. If you change your address within Thurston County, **or have been released from custody**, you are required to notify the Thurston County Sheriff's Office in person or by mail within three business days of moving to the new address. If you make your notification by mail it must be sent by certified mail return receipt requested. When submitting written changes to include the following information: **A) The date. B) Your old address. C) your new physical and mailing address, phone number. D) Your signature**. (Emphasis in Original).

This form only provides notice that the offender has a duty to re-register if they are in custody, then released for a sex offense, not some other offense, such as the DOC violation here. At best, the notice is misleading.

Also, there is no evidence in the record that Mr. Tash listened to the voicemail that was left by the Thurston County Sheriff's Office, and therefore no evidence had had actual notice of his obligation to re-register. Accordingly, the State failed to show their lack of notice was remedied under *Munds*.

The record is also silent as to whether the state patrol provided notice to Mr. Tash of any change to registration requirements through the years as required by RCW 9A.44.145.

The statute plainly requires the State agency with jurisdiction over Mr. Tash to provide him notice of his obligation to re-register after being incarcerated. This is a critical due process right as the failure to re-register has resulted in Mr. Tash being sentenced to 22 months in prison.

3. The trial court erred by imposing mandatory legal financial obligations without making any inquiry as to Mr. Tash's present or future ability to pay.

The trial court imposed a $500 Crime Victim Assessment, $200 in Court Costs, and $100 Felony DNA Collection Fee. The Court noted these were mandatory legal financial obligations (LFOs) under the applicable statutes and made no inquiry as to Mr. Tash's ability to pay. See 3-14-16 Sentencing transcript at p.8. CP 84-96. See also; *State v. Clark*, 191 Wash.App. 369, 362 P.3d 309 (Div. III, 2015).

The Washington Supreme Court held that "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional

limitations." *State v. Duncan*, 185 Wash.2d 430, 436, 374 P.3d 83 (2016). Citing; *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116 (1974). The *Duncan* court held the repayment must not be mandatory, repayment may be ordered only if the defendant is or will be able to pay, and the financial resources of the defendant must be taken into account. 185 Wash.2d at

436. (quoting State v. Curry, 128 Wash.2d 911, 915-16, 817 P.2d 867(1991); (quoting *State v. Eisenman*, 62 Wash. App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (1991).

The Supreme Court in *Fuller* stated under the 14th Amendment to the United States Constitution, "Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." 417 U.S. at 46. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 600, 665, 103 S.Ct. 2064 (1983).

These mandates are clearly contradictory to the Washington statutes imposing mandatory LFOs without inquiry into the defendant's financial resources.

Mr. Tash's counsel did not raise this issue below. However, RAP 2.5 vests appellate courts with discretion to review this claim of error. *Duncan,* 185 Wash.2d at 437. ("But while appellate courts 'may refuse to review any claim of error which was not raised in the trial court,' they are not required to, RAP 2.5. Given the "ample and increasing evidence that unpayable LFOs 'imposed against indigent defendants' imposed significant burdens on offenders and our community, including 'increased

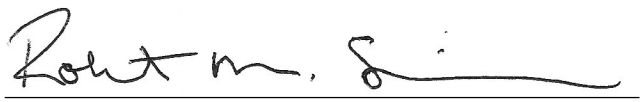
difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration,'" this court should exercise its discretion and address Mr. Tash's substantive due process challenge to the $800 in LFOs on the merits. *Id.* Quoting; *State v. Blazina*, 182 Wash.2d 827, 835-37, 344 P.3d 680 (2015).

IV. CONCLUSION

For the reasons stated, this Court should reverse and dismiss the Information, or vacate the legal financial obligations and remand the case to make the trial court make an individualized inquiry into defendant's current and future ability to pay.

DATED this 19th day of June, 2017.

Respectfully submitted,



Robert M. Seines, WSBA 16046
Attorney for Cory Tash

CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on June 20, 2017, I provided e-mail service by prior agreement (as indicated), a true and correct copy of the annexed Statement of Arrangements.

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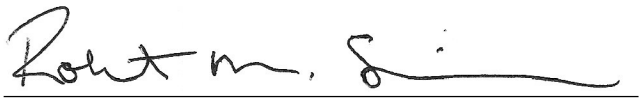

s/Robert M. Seines

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Appellate Court Case Title:	State of Washington, Respondent v. Cory Tash, Appellant
Superior Court Case Number:	16-1-01745-6

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